

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

TORIBIO VILLA DANIELS,

Defendant and Appellant.

C057945

(Super. Ct. No. 07F00662)

A jury found defendant Toribio Villa Daniels guilty of inflicting corporal injury on a cohabitant, assault with a deadly weapon, aggravated mayhem, and misdemeanor battery, while sustaining enhancements for great bodily injury and personal use of a deadly weapon. The court sentenced defendant to life with the possibility of parole plus three years.

On appeal, defendant contends there is insufficient evidence to support the aggravated mayhem conviction, ineffective assistance of counsel in failing to request a pinpoint instruction, and the misdemeanor battery conviction must be reversed as a lesser included offense of inflicting

corporal injury on a cohabitant. We shall reverse the conviction for battery and otherwise affirm the judgment.

#### BACKGROUND

Sylvia Hernandez (Sylvia) held a New Year's Eve party for her nieces and their children on December 31, 2006. Among the attendees were Maria Morales, Jennifer Barrera, defendant's sister, and Ramona Hernandez (Hernandez). Hernandez had been seeing defendant for about one and one-half years and was living with him. Defendant helped prepare for the party but did not attend.

Barrera and Hernandez both consumed a considerable amount of alcohol and used cocaine that night. Sylvia did not drink, and Morales, who was taking medication for schizophrenia, only had one drink.

The party moved to a nearby bar shortly before midnight. Hernandez called her friend Jean Paul Hinojosa and asked him to meet her at the bar. Hinojosa, who previously had sexual relations with Hernandez, met the party at the bar. After midnight, Hinojosa and the others returned to Sylvia's house.

As the party continued, Hinojosa and Hernandez went to the living room to lie down. Barrera was outside when she saw defendant come into the backyard through the side gate. A visibly angry defendant asked Barrera where he could find Hernandez and then entered the house through the back door.

Sylvia was asleep in her bedroom but was awoken by Hernandez yelling at defendant to get out. She left her bedroom and saw Hernandez arguing with defendant in the living room.

After defendant said something to Hernandez about her seeing some other guy, Hernandez told him to leave.

Defendant punched Hernandez in the face, sending her to the floor. An "emotional" Hernandez told defendant he broke her nose. Hinojosa then stepped up, challenged defendant, and the two began to fight.

Defendant eventually paused, got a "crazy look," and jumped back into the fight. Still fighting back, Hinojosa fell into a bedroom door as defendant continued to attack him. The fight ended after defendant was flung back by one of Sylvia's nieces.

Morales was with the children when she heard a commotion in the living room. She went to the living room and saw defendant hit Hernandez in the face. Hernandez went down, got up, and defendant hit her in the face again, causing her to fall down.

According to Morales, Hinojosa then got up and started fighting defendant. Morales turned to keep the children from entering the room, and saw a lot of blood when she turned back. Shortly after the incident, Morales told a police officer that defendant pulled out a box cutter and used it to slice up Hinojosa's face.

Hinojosa did not want to testify. According to his testimony, he assaulted the person who struck Hernandez in the face, but could not identify that person because he was intoxicated at the time. He believed the other person struck him, and Hinojosa remembers seeing blood on himself. The next thing he remembered was waking up in the hospital.

Hinojosa sustained numerous wounds to his face and hands, with additional wounds to his neck and a puncture wound to his back. He had extensive lacerations to the left side of his face around the eye, left cheek, left upper lip, below the jaw line, and on the anterior of the neck, near the carotid artery and the internal jugular. The wounds were caused by a sharp instrument like a razor or a knife.

Hinojosa sustained a total of 26 inches of lacerations. There was a cut on his mouth deep enough to expose the underlying muscles and his upper lip was split. He underwent two hours of cosmetic surgery to repair the damage to his face and hands. The surgery left approximately 80 stitches to his face and 20 to his hands. In violation of his doctor's orders, Hinojosa removed the stitches on his own. Hinojosa sustained permanent scars, which would have been worse without cosmetic surgery.

Hinojosa recuperated at the home of his former guardian Elizabeth Ramirez. He told Ramirez that after Hernandez fell on him he jumped up to defend her from her ex-boyfriend. They exchanged blows until Hinojosa felt weak and numb. Seeing blood everywhere, he realized he had been cut. Hinojosa was afraid to testify, fearing retaliation from his assailant's associates or friends.

At the hospital, Hinojosa told a police officer that he stood up to protect his girlfriend from her ex-boyfriend, who took out a box cutter and sliced up his face. He told another

officer at the scene that Hernandez's ex-boyfriend sliced him in the face during a fight.

Hernandez told Elizabeth Ramirez she was afraid to testify as she would be labeled as a snitch and could face retaliation. According to her testimony, she was very drunk and had no recollection of what happened between going through the side gate of her aunt's house and waking up in the hospital.

Hernandez told a police officer she was awoken by her ex-boyfriend yelling at her after he came into the house. They argued, and he struck her, possibly knocking her out for a short time. She awoke to find Hinojosa and defendant fighting. After fighting for awhile, defendant pulled out a box cutter, said, "fuck you bitch, I am going to kill you now," and used it on Hinojosa. She told the officer defendant was angry with her because she did not go with him that night. Hernandez gave a similar account of the incident to Elizabeth Ramirez.

Defendant presented evidence from two witnesses that he was at another New Year's Eve party that night.

## DISCUSSION

### I

#### *Substantial Evidence*

Defendant contends there is insufficient evidence of a specific intent to cause permanent disability or disfigurement to support his conviction for aggravated mayhem. We disagree.

In considering a sufficiency of the evidence claim, we view the evidence in the light most favorable to the judgment, presume in support of the judgment every fact which may be

reasonably deduced from the evidence, and "determine, in light of the whole record whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 510; see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

In relevant part, Penal Code section 205 provides: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body."

"Aggravated mayhem . . . requires the specific intent to cause the maiming injury. [Citation.] Evidence that shows no more than an 'indiscriminate attack' is insufficient to prove the required specific intent. [Citation.]" (*People v. Park* (2003) 112 Cal.App.4th 61, 64.)

"As our Supreme Court has explained, '[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]' [Citation.] In particular, '[a] jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.]" (*People v. Park, supra*, 112 Cal.App.4th at p. 68.)

Viewed in the light most favorable to the verdict, the evidence shows an angry defendant came to the house, where he found Hernandez and Hinojosa, a man with whom she had been intimate in the past, on the living room floor. Defendant hit Hernandez twice in the face during the ensuing argument, causing Hinojosa to come to her defense and fight defendant. At some point during the fight, defendant pulled out a box cutter and used it on Hinojosa. The fight ended with defendant attacking Hinojosa from a superior position as his victim was leaning on the bedroom door.

Defendant's attack caused Hinojosa to sustain numerous disfiguring wounds to the face, along with extensive wounds to the hands, some wounding of the back, and very serious cuts to the neck area. He described his face as "burning" just after the attack and needed extensive cosmetic surgery to prevent even greater permanent scarring.

There is evidence defendant was jealous; during their argument defendant had accused Hernandez of being with another man. A jury could reasonably infer that defendant's jealousy motivated his assault with the box cutter. The nature of the attack, primarily a sustained assault on Hinojosa's face with a box cutter, when combined with the evidence of motive, proves defendant intended to disfigure a potential rival for defendant's girlfriend.

Neither the presence of wounds to other parts of Hinojosa's body nor defendant's threat to kill his victim changes our analysis. While there were some wounds to his back and neck,

and the wounds to the neck were close to potentially fatal areas, the overwhelming majority of the attack landed on the face or hands. Although no evidence directly states the wounds to the hands were defensive, the jury could reasonably conclude that the presence of wounds to the hands, neck, and back reflected a victim who was resisting a sustained attack on his face rather than an unfocused attack lacking the intent to disfigure.

The cases on which defendant relies to support his argument that the evidence was insufficient -- *People v. Sears* (1965) 62 Cal.2d 737, disapproved on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, footnote 17; *People v. Anderson* (1965) 63 Cal.2d 351; and *People v. Lee* (1990) 220 Cal.App.3d 320 -- are inapposite.

In *Sears*, the defendant attacked his estranged wife with a steel pipe, striking her about the head and face, and then turned on his stepdaughter, striking her with the pipe and stabbing her in the neck with a knife. (*People v. Sears, supra*, 62 Cal.2d at pp. 739-741, 743.) The stepdaughter "died as a result of a knife wound which punctured her jugular vein" and "also suffered a scalp wound and several lacerations to her face." (*Id.* at p. 741.)

The Supreme Court concluded the evidence was insufficient to prove the defendant committed murder in the perpetration of mayhem. (*People v. Sears, supra*, 62 Cal.2d at p. 745.) According to the court, evidence that the defendant "struck [his stepdaughter] several times with a steel pipe," lacerating her



lip and her nose, did "no more than indicate an indiscriminate attack; it d[id] not support the premise that [the] defendant specifically intended to maim his victim." (*Ibid.*)

In *Anderson*, the defendant killed the daughter of a woman he was living with one afternoon when he stayed home from work drinking. (*People v. Anderson, supra*, 63 Cal.2d at pp. 355-356.) The victim, who died from a laceration to her lung, suffered "41 wounds ranging over the entire body from the head to the extremities. (*Id.* at p. 356.)

The Supreme Court once again concluded the evidence was insufficient to prove the defendant committed murder in the perpetration of mayhem. (*People v. Anderson, supra*, 63 Cal.2d at pp. 358-359.) The court explained, "the record here does not disclose substantial evidence showing a specific intent to commit mayhem. The evidence does no more than indicate an indiscriminate attack; it cannot independently uphold a verdict based on the precise premise that [the] defendant entertained the specific intent to commit mayhem." (*Id.* at p. 359.)

Both Supreme Court cases are inapposite from the instant case. Evidence of a motive for disfiguring the victim was absent from both cases, and the attacks were much less focused and more random than defendant's assault on Hinojosa.

*Lee* involved an unprovoked attack by the defendant, who entered the victim's room uninvited, said "'You know what to do,'" and hit him three times in the face with his fist. (*People v. Lee, supra*, 200 Cal.App.3d at p. 323.) Defendant "also kicked his victim at least twice somewhere on his body,

but there was no evidence that the kicks were to his head.”

(*Id.* at p. 326.) Although the victim was partially paralyzed as a result of head trauma (*id.* at p. 323), there was insufficient evidence of an intent to maim. “The evidence shows no more than a sudden, indiscriminate, and unfocused battering of [the victim]’s body. While this evidence undoubtedly shows extreme indifference to [the victim]’s physical well-being, it does not show a controlled, directed, limited attack . . . from which a jury could reasonably have inferred that defendant specifically intended to disable [the victim] permanently.” (*Id.* at p. 326.)

Lee involved an attack where the victim had the misfortune of becoming paralyzed. (*People v. Lee, supra*, 220 Cal.App.3d at p. 323.) As the Court of Appeal noted, the defendant in *Lee* neither shot nor stabbed his victim, but attacked him with his hands and feet. (*Id.* at p. 326.) By contrast, a jealous defendant attacked Hinojosa with a box cutter and directed the overwhelming majority of the attack against the face, permanently disfiguring his victim. This is substantial evidence supporting a specific intent to maim.

## II

### *Pinpoint Instruction*

A defendant is entitled to an instruction pinpointing the theory of his defense upon request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Defendant asserts trial counsel was ineffective for failing to request a pinpoint instruction which states an intent to maim cannot be inferred solely from evidence that the injury

constituted mayhem and there must be additional evidence showing an intent to maim rather than an indiscriminate attack. We disagree.

"A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.)

Generally, where the instructions, without pinpoint instructions, allow defense counsel to make the arguments and do not hinder the jury in considering those arguments, counsel is not ineffective for not requesting pinpoint instructions. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1018 [finding no ineffective assistance of counsel where counsel did not request additional pinpoint instruction].) The jury was instructed with CALCRIM No. 800 regarding aggravated mayhem, which requires the People to prove that the defendant "intended to permanently disfigure the other person" and with CALCRIM No. 801 on the lesser included offense of mayhem, which does not require a specific intent to permanently disfigure. These instructions allowed defendant to argue that the nature of his victim's injuries by themselves did not prove an intent to disfigure.

While trial counsel argued there was no evidence of an intent to permanently disfigure, the primary thrust of the defense was defendant did not commit the crimes. Counsel could reasonably conclude the pinpoint instruction was unnecessary in

light of CALCRIM Nos. 800 and 801, and could deflect attention from the alibi defense. Trial counsel is vested with broad discretion concerning how to conduct the defense, and we are directed to “indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance . . . .” [Citations.]” (*People v. Earp* (1999) 20 Cal.4th 826, 896.) Defendant has not carried his burden of proving either ineffective assistance or prejudice.

### III

#### *Lesser Included Offense*

Defendant contends and the People concede that the conviction for misdemeanor battery should be reversed as a lesser included offense of corporal injury on a cohabitant. We agree.

Penal Code section 954 provides a defendant may be charged with and convicted “of any number of the offenses charged” from a single course of conduct. Lesser included offenses are an exception to this rule. “A defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act.” (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.)

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the

accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]” (*People v. Birks* (1998) 19 Cal.4th 108, 117.) “Courts should consider . . . only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes.” (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.)

Defendant was convicted of corporal injury to a cohabitant in count one and misdemeanor battery in count two for his attack on Hernandez. Penal Code section 273.5 provides as relevant: “(a) Any person who willfully inflicts upon a . . . cohabitant, . . . corporal injury resulting in a traumatic condition, is guilty of a felony . . . . [¶] (c) As used in this section, ‘traumatic condition’ means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.”

Section 273.5 defines an offense which is a specialized crime of battery that applies to particular persons; thus battery is a lesser included offense of section 273.5. (*People v. Abrego* (1993) 21 Cal.App.4th 133, 137-138.) We shall reverse defendant’s battery conviction. Since sentencing on the battery count was stayed pursuant to Penal Code section 654, resentencing is unnecessary.

#### DISPOSITION

The judgment of conviction for misdemeanor battery is reversed, and the trial court is directed to dismiss the count. In all other respects, the judgment is affirmed. The trial

court is directed to prepare an amended abstract of judgment reflecting the dismissal of this count and forward a certified copy to the Department of Corrections and Rehabilitation.

\_\_\_\_\_  
ROBIE, J.

We concur:

\_\_\_\_\_  
RAYE, Acting P. J.

\_\_\_\_\_  
HULL, J.